

SUPREME COURT U.S.
FILED

JAN 5 1978

MICHAEL RODRIGUEZ, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-489

**CITY OF WILCOX AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.**

Petitioners,

FEDERAL ENERGY REGULATORY COMMISSION

**NOTION OF NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

AND

**BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR CERTIORARI**

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200 Florida Avenue, N.W.
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January, 1978

IN THE
Supreme Court of the United States

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No. 77-489

CITY OF WILLCOX AND
ARIZONA ELECTRIC POWER COOPERATIVE, INC.

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION

**MOTION OF NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

The National Rural Electric Cooperative Association (NRECA) respectfully moves this Court for leave to file the accompanying amicus curiae brief in support of the petition for a writ of certiorari. The consent of the attorney for the intervenor herein, El Paso Natural Gas Company, has been denied. This case is scheduled for consideration by the Court on January 6, 1978. The Government filed its answering brief on January 3, 1978 and the office procedures of the Solicitor General make it impossible to obtain consent to file this brief before the Court considers the case.

NRECA has 950 members serving some 25 million electric consumers in 46 states. It has a direct and substantial interest in this case because the petitioner and many of its other member cooperatives are served by federally regulated interstate gas pipelines. The Federal Energy Regulatory Commission has not

formulated the challenged boiler fuel curtailment policy on the basis of case-by-case determinations rooted in the particular circumstances of an individual pipeline. Rather, it has applied a uniform rationale to all interstate pipelines to support both the subordination of boiler fuel used to generate electricity and the "nomination" procedure used to classify particular gas requirements in specific priorities. These rationales are of industry-wide applicability and the denial of the petition here would affect those member cooperatives served by any interstate pipeline. Many other NRECA member cooperatives are served by intrastate pipelines not currently subject to federal curtailment jurisdiction. It has been repeatedly proposed that Congress confer such jurisdiction upon the Commission.

The petition for certiorari argues that the challenged policies are of industry-wide applicability. That discussion concentrates on the problems of generation and transmission cooperatives which comprise only 54 of our 950 electric systems. NRECA believes it is vital that the Court also be advised of the impact of the decision below on the majority of its cooperatives, which are engaged in the distribution of electricity purchased from other electric utilities. Petitioner's discussion also does not treat the several respects in which the policies affirmed by the Court have a different impact upon electric cooperatives than upon other electric utilities. NRECA respectfully submits that these factors are relevant to the disposition of the petition by this Court and that the interests of its member cooperatives and the 25 million consumers they serve are not otherwise adequately represented.

WHEREFORE, NRECA respectfully requests the Court to grant it leave to file its brief as amicus curiae in support of petitioner.

Respectfully submitted,

Charles A. Robinson, Jr.

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**BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE
ASSOCIATION AS AMICUS CURIAE IN SUPPORT
OF PETITION FOR CERTIORARI**

The National Rural Electric Cooperative Association herewith files its brief, amicus curiae, in the above entitled case. This brief is filed in support of the petition for a writ of certiorari of the City of Willcox and Arizona Electric Power Cooperative, Inc. For the reasons set forth below, we believe that the Court of Appeals here erred in affirming the decisions by the Federal Energy Regulatory Commission which:

1. subordinate boiler fuel uses to all other industrial uses, and
2. permit the substitution of the "nominations" method of determining each customer's priority-by-priority gas entitlement for the formerly, and properly, required actual end-use data method.

INTEREST

The National Rural Electric Cooperative Association (NRECA) is a nonprofit corporation, organized under the laws of the District of Columbia, which represents the interests of 950 nonprofit rural electric cooperatives. Our member cooperatives provide electric service to approximately 25 million residential, commercial and industrial consumers in rural, sparsely populated areas of 46 states. These cooperatives are owned and controlled by the consumers of the electricity they generate, transmit and distribute. Some 54 of these cooperatives are engaged in the generation or wholesale supply of electricity; 896 distribute electricity to retail consumers. Approximately 63% of the electricity all cooperatives sell is for residential use and 7% is for small commercial use.¹

The decision of the Court below approved certain aspects of the curtailment plan prescribed by the Federal Energy Regulatory Commission (Commission) for the interstate pipeline system of El Paso Natural Gas Company (El Paso). In NRECA's view, these opinions and orders represent a further evolution of the Commission's general curtailment policies and, as such, are of general applicability to all federally regulated interstate pipelines. NRECA has a direct and substantial interest in this case because many of its member cooperatives are served by such pipelines and will be adversely and materially affected by this decision. Furthermore, it has been repeatedly proposed that Congress give the Commission jurisdiction over intrastate pipelines, which are not currently federally regulated. The many additional cooperatives served by such intrastate pipelines would, in that event, also be adversely affected by this decision.

ARGUMENT

A. Boiler Fuel

The Court below upheld the provisions of El Paso's curtailment plan which relegate boiler fuel customers to the lowest

¹1976 Annual Statistical Report, Rural Electrification Administration, June 1977, p. 24.

priority of service, while preferring other industrial customers who are equally capable of burning substitute fuels. Those member cooperatives who use gas in boilers to generate electricity are thus forced to substitute higher priced fuels² and to bear the economic impact of curtailment *in the first instance and predominantly*. This policy is equally detrimental to those distribution and transmission cooperatives who purchase or transmit electricity generated by private or public utilities whose boiler fuel requirements are also curtailed. Ultimately, the residential, commercial and industrial customers of these cooperatives will bear the burden of this plan's subordination of boiler fuel by paying higher rates for electrical service. Residential consumers who directly use gas in their homes are favored by the highest priority rating and escape the higher costs of energy imposed on residential users of electricity generated by gas. The Commission failed to establish an adequate record and supporting justification for such gross discrimination between residential users of energy.

One of the reasons the Commission cites in support of its boiler fuel policy is "efficiency of scale" in pollution control. This concept is based only on differences in size between one gas appliance and another such appliance. But, the Court below based curtailments upon the aggregate volume of boiler or non-boiler usage at an individual plant location. Logically, the Commission must choose between using the individual gas appliance as the unit of curtailment or using total gas volumes burned in each plant as the unit of curtailment. Instead, it has adopted an illogical and unfair hybrid unit of curtailment which looks to the nature of the gas appliance only insofar as it is a boiler for the purpose of placing those requirements in the lowest priority and looks to the relative size only for the purpose of differentiating between small boilers classified in Priority 4 and large boilers classified in Priority 5.

²Since interstate natural gas prices are federally regulated, gas is always less expensive than fuel oil or propane and frequently less expensive than coal. Furthermore, boilers designed to burn gas can only be modified to burn fuel oil. Such boilers cannot burn coal and must be replaced entirely to switch to that fuel. This is uneconomic for utility plants with a 30-year life.

The cost of pollution control is also only one factor in the increased costs of a subordinated class of gas users. The *one-time, nonrecurring* cost of installing pollution abatement equipment must be balanced against the *recurring* annual cost of substitute fuels. The Commission made no attempt to balance these factors. Furthermore, even if such nationwide pollution control savings could be realized, there is no public interest justification for compelling one class of users to bear both the majority of the economic burden of curtailment *and the entire cost of such environmental protection*. This plan clearly benefits only those preferred industrial customers who still receive gas and who are also spared the additional cost of pollution control.

NRECA's member cooperatives and their consumer-owners are directly and adversely affected by the Commission's boiler fuel policy. Investor-owned utilities can also pass on the increased cost of generating electricity to their customers. But, they are not equally subject to consumer pressures for lower rates.

In addition, many of these investor-owned utilities are combination gas and electric companies. These combination companies do not lose any profits when their electric generation boiler fuel is curtailed. They can pass on additional costs under automatic fuel adjustment clauses. And, the preference given to their gas department requirements increases their natural gas sales over the amount it would have been under equal curtailment of both departments. The latter policy would decrease the amount of gas received by the combination utility's gas department for resale. This explains the failure of such other electric utilities to attack the boiler fuel policy at issue in this proceeding. Nevertheless, the Commission's unjustified curtailment policies increase the cost of electricity, throughout the nation, to each and every customer of an electric utility which uses natural gas to generate electricity.

B. End Use Data

The Court's decision also affirmed the end-use data method prescribed by the Commission. This method permits the substitution of customer "nominations" of gas requirements

for actual, verifiable data based on priority-by-priority use during a past period. It affords no protection against the fraudulent or mistaken overstatement of high priority requirements which could result from any misunderstanding of the orders prescribing and approving the method, or from the lack of uniformity, supervision or verification in El Paso's gathering of these nominations. Such overstatements not only reduce the gas supply available to serve NRECA's member cooperatives and other low priority users, but, in periods of severe curtailment, can jeopardize service to true high priority requirements. Again, the economic burden of the unfair curtailment of the gas supplies of these cooperatives is ultimately borne by their residential, commercial and industrial customers in the form of higher electric rates.

Among the many deficiencies in the "nominations" method is that El Paso's procedures are complicated and, as the Court noted (Pet. App., p. A-54, fn. 20) subject to many honest misunderstandings. Despite this, El Paso accepted at face value the requirements its resale distributor and direct industrial customers nominated in each priority. Surely, the accuracy of such claims should not be solely a matter of discretion on the part of the individual making the claim. El Paso has not submitted any data to the Commission justifying these priority allocations and, in fact, has not developed any method of checking such claims against its customers' actual use. In addition, no information even exists from which distributor nominations in each priority can be compared with actual use in that same priority. No information exists on the consumer-by-consumer nominations of any of the industrial customers served by El Paso's distributor customers, even though their requirements represent 87% of the total Priority 3, 4 and 5 industrial requirements on El Paso's system.³ NRECA believes that the Court below was not aware of these clear deficiencies of the "nominations" method.

³El Paso Natural Gas Company, Compliance Filing Pursuant to Opinion 697-A, Docket No. RP72-6, dated March 31, 1977.

CONCLUSION

For these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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January, 1978